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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/698,301	10/27/2000	Michael John Niemeyer	KCC-15,568	5826

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EXAMINER

STEPHENS, JACQUELINE F

ART UNIT	PAPER NUMBER
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3761

15

DATE MAILED: 03/31/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

09/698,301

Applicant(s)

NIEMEYER ET AL.

Examiner

Jacqueline F Stephens

Art Unit

3761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 03 November 2003.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-7 and 9-115 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-4, 9-12, 17-23 and 25-35 is/are rejected.
- 7) ☒ Claim(s) 5-7, 13-15 and 24 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 03 August 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. §§ 119 and 120

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
* See the attached detailed Office action for a list of the certified copies not received.
- 13) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application) since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.
a) ☐ The translation of the foreign language provisional application has been received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121 since a specific reference was included in the first sentence of the specification or in an Application Data Sheet. 37 CFR 1.78.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892) 4) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948) 5) ☐ Notice of Informal Patent Application (PTO-152)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) _____ 6) ☐ Other: _____

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 11/3/03 has been entered.

Response to Arguments

2. Applicant's arguments with respect to claims 1-35 have been considered but are moot in view of the new ground(s) of rejection. Applicant's arguments submitted 9/29/03 are persuasive, particularly with regard to the Garcia reference, pages 8-10.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1, 9, 17, and 21 are rejected under 35 U.S.C. 102(b) as being anticipated by Jessup USPN 5545158.

As to claim 1, Jessup discloses an absorbent garment having the body of a swim garment (col. 3, lines 14-15) and capable of being use of a swim garment comprising: a chassis including a liquid-permeable body side liner **34**, a selectively liquid-permeable outer cover **36**, and an absorbent assembly **28** between the body side liner and the outer cover (Figure 1 and col. 4, line 55 through col. 5, line 43). Jessup discloses the outer cover 36 may be liquid permeable (col. 5, lines 8-10), therefore a liquid that permeates the outer cover can be expelled through the outer cover into an open environment outside of the garment.

As to claim 9, Jessup discloses an absorbent garment having the body of a swim garment (col. 3, lines 14-15) and capable of being use of a swim garment comprising: a chassis including a liquid-permeable body side liner **34**, a selectively liquid-permeable outer cover **36**, and an absorbent assembly **28** between the body side liner and the outer cover (Figure 1 and col. 4, line 55 through col. 5, line 43). Jessup discloses the outer cover 36 may be liquid permeable (col. 5, lines 8-10), therefore a liquid that permeates the outer cover can be expelled through the outer cover into an open environment outside of the garment. Jessup discloses the absorbent assembly comprises fluff and superabsorbent (col. 5, lines 39-42).

As to claim 17, Jessup discloses an absorbent garment having the body of a swim garment (col. 3, lines 14-15) and capable of being use of a swim garment comprising: a chassis including a liquid-permeable body side liner **34**, a selectively liquid-permeable outer cover **36**, and an absorbent assembly **28** between the body side liner and the outer cover (Figure 1 and col. 4, line 55 through col. 5, line 43). Jessup

discloses the outer cover 36 may be liquid permeable (col. 5, lines 8-10), which includes the crotch area, therefore, a liquid that permeates the outer cover can be expelled through the outer cover into an open environment outside of the garment. Jessup discloses the absorbent assembly comprises fluff and superabsorbent (col. 5, lines 39-42).

As to claim 21, Jessup discloses the outer cover 36 may be liquid permeable (col. 5, lines 8-10), therefore, 100% of the surface area of the outer cover is liquid permeable.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 22 and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jessup USPN 5545158. Jessup discloses the present invention substantially as claimed. Jessup does not specifically the percentage of surface area of the outer cover that is liquid permeable. However, the specification contains no disclosure of either the critical nature of the claim limitations nor any unexpected results arising therefrom, and that as such the limitations were arbitrary and therefore obvious. Such unsupported

limitations cannot be a basis for patentability, since where patentability is said to be based upon particular dimensions or another variable in the claim, the applicant must show that the chosen variables are critical. In re Woodruff, 919 F.2d 1575, 1578, 16 USPQ 2d 1934 (Fed. Cir. 1990). One having ordinary skill in the art would be able to determine through routine experimentation the ideal levels of permeability for the outer cover for a particular application.

7. Claims 2-4, 10-12, and 18-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jessup in view of Good et al. USPN 5843056 .

As to claims 2-4, 10-12, and 18-20, Jessup discloses the present invention substantially as claimed. However, Jessup does not disclose the outer cover is liquid permeable only to liquids having a hydrostatic pressure greater than about 1 inch. Good teaches a breathable backsheet that is impermeable to liquids at a hydrohead value of 50 cm (19.68 inches) and above according to a hydrostatic pressure test and permeable to liquids at a hydrostatic pressure below 50 cm (col. 10, lines 9-19). Therefore, the liquid permeable backsheet of Jessup, if tested according to the hydrostatic pressure test taught in Good has or obviously has the claimed hydrostatic pressure values since Good teaches at a hydrostatic pressure of 50 cm the material is impermeable below that value, which includes a range from 0-49 cm, the material is permeable. Additionally, the liquid permeable outer cover of Jessup has the same properties (liquid permeability) and is used in the same environment, as applicant's

outer cover (swimwear). Therefore, the general conditions of the claimed invention are present in the prior art. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the backsheet of Jessup with the claimed hydrostatic pressure value, since where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation, *In re Aller et al.* 105 USPQ 233.

8. Claims 25 and 29-35 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jessup USPN 5545158 in view of Buell USPN 5085654.

As to claim 25, Jessup discloses the present invention substantially as claimed. However, Jessup does not disclose containment flaps. Buell discloses containment flaps that are vapor permeable and to while the cuffs retard the flow of liquid, Buell discloses the cuffs are to some degree, liquid permeable (col. 2, lines 51-61). Buell provides the cuffs for the benefit of provide vapor permeability, particularly in the crotch region (col. 2, lines 39-45). It would have been obvious to one having ordinary skill in the art at the time the invention was made to modify the article of Jessup to include the cuffs of Buell for the benefits described in Buell.

As to claims 29-31, Jessup/Buell discloses the present invention substantially as claimed. Jessup/Buell does not specifically the percentage of surface area of the outer cover that is liquid permeable. However, the specification contains no disclosure of either the critical nature of the claim limitations nor any unexpected results arising

therefrom, and that as such the limitations were arbitrary and therefore obvious. Such unsupported limitations cannot be a basis for patentability, since where patentability is said to be based upon particular dimensions or another variable in the claim, the applicant must show that the chosen variables are critical. In re Woodruff, 919 F.2d 1575, 1578, 16 USPQ 2d 1934 (Fed. Cir. 1990). One having ordinary skill in the art would be able to determine through routine experimentation the ideal levels of permeability for the outer cover for a particular application.

As to claim 32, Jessup/Buell discloses the containment flaps comprise a gradient of permeability (Buell col. 2, lines 62-63 and col. 10, lines 60-66 and Figures 8 and 9).

As to claim 33, Jessup/Buell see Buell Figures 6-9.

As to claim 34, Jessup/Buell discloses apertures in the containment flaps (Buell col. 10, lines 60-66 and Figures 8 and 9).

As to claim 35, Jessup/Buell incorporates by reference (col. 5, lines 47-51) Hanson et al. USPN 5509915 who discloses an absorbent assembly that directs incoming aqueous fluids away from point of contact and spreads the liquid to other parts of the surge management portion, which in the case of the absorbent assembly disclosed in Hanson would be in a lateral direction, away the containment flaps (Hanson col. 19, lines 19-35 and Figures 1, 3-5, and 7).

9. Claims 26-28 are rejected under 35 U.S.C. 103(a) as being unpatentable over Jessup in view of Buell USPN 5085654 as applied to claim 25 above, and further in view of Good et al. USPN 5843056 .

As to claims 26-28, Jessup/Buell discloses the present invention substantially as claimed. However, Jessup/Buell does not disclose the outer cover is liquid permeable only to liquids having a hydrostatic pressure greater than about 1 inch. Good teaches a breathable backsheet that is impermeable to liquids at a hydrohead value of 50 cm (19.68 inches) and above according to a hydrostatic pressure test and permeable to liquids at a hydrostatic pressure below 50 cm (col. 10, lines 9-19). Therefore, the liquid permeable backsheet of Jessup/Buell, if tested according to the hydrostatic pressure test taught in Good has or obviously has the claimed hydrostatic pressure values since Good teaches at a hydrostatic pressure of 50 cm the material is impermeable below that value, which includes a range from 0-49 cm, the material is permeable. Additionally, the liquid permeable outer cover of Jessup/Buell has the same properties (liquid permeability) and is used in the same environment, as applicant's outer cover (swimwear). Therefore, the general conditions of the claimed invention are present in the prior art. It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the backsheet of Jessup/Buell with the claimed hydrostatic pressure value, since where the general conditions of a claim are disclosed in the prior art, it is not inventive to discover the optimum or workable ranges by routine experimentation, *In re Aller* et al. 105 USPQ 233.

Allowable Subject Matter

10. Claims 5-7, 13-15, and 24 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims. The following is a statement of reasons for the indication of allowable subject matter: The overall claimed combination of a liquid permeable backsheet being more liquid permeable in the crotch region via apertures in the crotch region is neither anticipated nor rendered obvious by the prior art of record.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Jacqueline F Stephens whose telephone number is (703) 308-8320. The examiner can normally be reached on Monday-Friday 9:00-5:30.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, John Calvert can be reached on (703)305-1025. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

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Jacqueline F Stephens
Examiner
Art Unit 3761

A handwritten signature in black ink, appearing to be 'JFS', written over the name 'Jacqueline F Stephens'.

March 22, 2004